

PHILLIPS PETROLEUM CO.

IBLA 88-415, 88-416

Decided September 24, 1990

Appeals from two decisions of the Deputy Director, Minerals Management Service, affirming, in part, assessments of charges for late reporting of royalties. MMS 87-0379-O&G through MMS 87-0381-O&G and MMS 87-0458-O&G through MMS 87-0461-O&G.

Affirmed.

1. Federal Oil and Gas Royalty Management Act of 1982: Civil Penalties--
Oil and Gas Leases: Civil Assessments and Penalties

Assessments for late reporting of royalty on production pursuant to the regulation at 30 CFR 218.40 are properly distinguished from civil penalties assessed under sec. 109 of the Federal Oil and Gas Royalty Management Act of 1982, 30 U.S.C. § 1719 (1982), and are not subject to the procedures required by that section.

2. Oil and Gas Leases: Civil Assessments and Penalties

An assessment of \$10 per report for the late reporting of royalty on production pursuant to 30 CFR 218.40 will be affirmed where 30 CFR 210.52 requires the filing of a completed Form MMS-2014 by the end of the month following the production month and it appears from the record that the reports were filed late.

APPEARANCES: T. L. Cubbage II, Esq., Office of the General Counsel, Phillips Petroleum Company, Bartlesville, Oklahoma, for Phillips Petroleum Company and Phillips 66 Natural Gas Company; Howard W. Chalker, Esq., Office of the Solicitor, Washington, D.C., for the Minerals Management Service.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Phillips Petroleum Company and Phillips 66 Natural Gas Company (Phillips) have appealed two decisions of the Deputy Director of the Minerals Management Service (MMS) dated January 25, 1988, affirming assessments for late reporting of royalties. The appeals have been consolidated

sua sponte because the MMS decisions and the statements of reasons for appeal (SOR) raise identical issues.

Phillips' appeal docketed as IBLA 88-415 concerns three assessments by Royalty Management Program (RMP) officials at MMS: One dated September 16, 1986, for \$2,430 (invoice No. 89601149) and two dated October 23, 1986, for \$4,570 (invoice No. 89606384) and \$10,000 (invoice No. 89606385). Phillips appealed these assessments to the Director of MMS (MMS 87-0379-O&G through MMS 87-0381-O&G). See 30 CFR part 290. An explanation of the basis of the assessments is found in a copy of a form letter addressed to "Dear Payor" which appears in the file and apparently accompanied the invoices. The letter explained that:

The enclosed Bill for Collection is an invoice for nonrespondent exceptions issued under the Minerals Management Service's (MMS) automated Auditing and Financial System (AFS). The nonrespondent exceptions are assessed pursuant to 30 CFR 218.56. [1/] * * *

The AFS will automatically check each month to determine if you have reported for each selling arrangement established for your payor code, and if your reports were filed timely on Form-2014, Report of Sales and Royalty Remittance. The AFS accomplishes this by comparing lines reported on the Form MMS-2014 to each of your active Accounting Identification Numbers, Product Code, Selling Arrangement (AID/PC/SA) in the AFS. These active AID/PC/SA's are created from data submitted on your Payor Information Forms (PIF's). Nonrespondent exceptions are assessed at \$10.00 per line per month for following types of errors:

1. Non-reporting: If Form MMS-2014 is not received on or before the due date, one nonrespondent exception is generated for each active AID/PC/SA you failed to report.
2. Late reporting: If Form MMS-2014 is received after the due date, one nonrespondent exception is generated for each active AID/PC/SA reported late.

(Payor Letter at 1).

In response to the appeals, the RMP Office, Fiscal Accounting Division, of MMS prepared a field report. Referring to the "exceptions" for which assessments were made, the report states that "510 exceptions were late reporting of royalties with value, 222 were nonreporting, 33 were MMS data-base coding problems, 11 were late reporting billed on a later invoice, 9 were reported timely but rejected from the AFS system, and 915 were late reporting of zero sales." It also indicates that "credits" granted by

^{1/} This regulation is now codified as 30 CFR 218.40. 51 FR 15767 (Apr. 28, 1986).

MMS 2/ reduced the total amount of the assessments from \$17,000 to \$5,100. The MMS decision affirmed the remaining assessments for the 510 instances of late reporting of royalties.

Phillips' appeal docketed as IBLA 88-416 concerns four assessments. Three were issued August 14, 1986, for \$560 (invoice No. 89600615), \$230 (invoice No. 89600617), and \$1,690 (invoice No. 89600737). The fourth was issued November 3, 1986, for \$2,500 (invoice No. 89606491). The RMP field report responding to Phillips' appeals to the Director (MMS 87-0458-O&G through MMS 87-0461-O&G) states that "112 exceptions were late reporting of royalties with value, 15 were nonreporting, 64 were MMS data base coding problems, 14 were reported timely but rejected from our system, 30 reports were billed on a later invoice, and 263 were late reporting of zero sales." As with Phillips' other appeals, MMS granted "credits" for all but the 112 instances of late reporting of royalties, reducing the total assessment from \$4,980 to \$1,120. Accordingly, the issue before the Board is limited to whether the assessment of late reporting charges is properly sustained for reports of royalty sales filed after the deadline.

On appeal Phillips presents three arguments. First, Phillips contends that assessments imposed under 30 CFR 218.40 3/ are unlawful civil penalties because the regulation does not provide the procedural safeguards required by section 109 of the Federal Oil and Gas Royalty Management Act of 1982 (FOGMRA), 30 U.S.C. § 1719 (1982), and MMS did not have other authority to promulgate the regulation (SOR at 5-10). Second, Phillips argues that the regulation is invalid because it arbitrarily defines a "report" to be each line on Form MMS-2014 (Report of Sales and Royalty Remittance) (SOR at 10-15). Third, Phillips argues that MMS' application of 43 CFR 218.40 deprives the company of due process of law (SOR at 15-24).

In response to Phillips' SOR, MMS sought a stay of proceedings pending a decision on its motion for reconsideration of the Board's decision in Conoco, Inc., 102 IBLA 230 (1988). MMS had sought reconsideration of an appeal by Tenneco Oil Company, IBLA 87-102, which had been consolidated among the appeals addressed by Conoco, arguing that the facts in the appeals by Phillips were identical to those concerning Tenneco and that the Board's

2/ As stated in the Deputy Director's decisions, the "credits" were assessments "deleted under the policy announced by the Director on Mar. 18, 1987. Under that policy, assessments for late reporting with zero sales will not automatically be issued. A 3-month period for correcting nonreporting violations is provided" (Decision at 1). The same language appears in both decisions. The decisions also note that additional "charges were deleted by RMP because of errors on its part."

3/ In relevant part, that regulation provides:

"(a) An assessment of an amount not to exceed \$10 per day may be charged for each report not received by MMS by the designated due date.

"(b) An assessment of an amount not to exceed \$10 may be charged for each report received by MMS by the designated due date but which is incorrectly completed."

decision on the request for reconsideration as to Tenneco's appeal would be controlling as to Phillips' appeals. A stay was granted by order dated November 30, 1988.

A decision on the request for reconsideration was issued March 7, 1990. Conoco, Inc. (On Reconsideration), 113 IBLA 243 (1990). On April 20, 1990, MMS filed an answer to Phillips' SOR. The answer states that Phillips does not dispute that its reports were filed late and contends that "the issue of whether MMS's assessments to Phillips are proper is controlled by Conoco, Inc. (On Reconsideration), where this Board considered and rejected arguments similar to those raised by Phillips" (Answer at 2).

In the consolidated appeals addressed in Conoco, Inc., supra, the appellants objected to the MMS practice of assessing \$10 per day for each incorrect or incomplete "report" on Form MMS-2014 and also objected to the provision of the regulation which defines a "report" to be each line item on the form. Prior to the Board's review of the appeals, MMS revised the regulation. ^{4/} Among other matters, the provision imposing daily assessments was eliminated. See 30 CFR 218.40. In Conoco Inc., supra, the Board noted that the prefatory comments to the rulemaking indicated that the revisions were intended to provide MMS flexibility in determining the amounts of assessments, reduce the total amounts of assessments, and relieve the burden which had been imposed on industry. Id. at 232-33; see 52 FR 27545, 27546 (July 22, 1987). We concluded that if the revised regulation were applied to the appeals, the "appellants may gain the relief they seek on appeal." Id. at 233. Applying the rule that, in the absence of countervailing public policy reasons or intervening rights, an amended version of a regulation may be applied to a pending matter if its application benefits the affected party, we set aside MMS's decisions and remand the cases for review in light of the revised regulations. Id.

MMS sought reconsideration of Conoco only in so far as the remand included Tenneco's appeal. MMS had assessed Tenneco \$10 per line for 770 report lines due to late filing of three MMS-2014 forms for a total of \$7,700. The Board agreed with MMS's contention that, because these assessments had not been imposed for each day of violation, the changes in the regulations would not affect Tenneco's total assessment. Accordingly, we granted reconsideration and vacated Conoco as to Tenneco's appeal. Conoco, Inc. (On Reconsideration), supra at 245.

[1] Turning to the arguments Tenneco had raised on appeal, the Board rejected the contention that the late reporting assessments were penalties,

^{4/} The regulation was originally codified at 30 CFR 218.56. 49 FR 37336, 37340 (Sept. 21, 1984). In 1986 it was redesignated as 218.40. 51 FR 15764, 15767 (Apr. 28, 1986). In 1987 the authorized assessment was changed from a flat rate of \$10 to "an amount not to exceed \$10" and the words "per day" were eliminated from subparagraph (b). 52 FR 27545, 27546 (July 22, 1987).

finding they were "in the nature of liquidated damages imposed to compensate MMS for the costs incurred as a result of the late reports." Id. at 248. We also concluded that authority to promulgate the regulations could be found in the Mineral Leasing Act, 30 U.S.C. § 189 (1982), and the Outer Continental Shelf Lands Act, 43 U.S.C. § 1334 (1982). Id. Accordingly, we held that the procedural requirements of section 109 of FOGMRA, 30 U.S.C. § 1719 (1982), do not apply to late reporting assessments under 30 CFR 218.40. Id. at 249. Finally, we rejected Tenneco's argument that the entire Form MMS-2014 should be considered one report. The Board noted that the relevant regulation defines a report to consist of each line item on Form MMS-2014. 30 CFR 218.40(c). Further, we held in accordance with well-established precedent that regulations have the force and effect of law and the Board lacks authority to declare invalid duly promulgated regulations of the Department. Id.

We find the Board's decision in Conoco, Inc. (On Reconsideration), supra, to be controlling in this case. Phillips' first argument that the assessments are unlawful civil penalties because the regulation does not provide the procedural safeguards of FOGMRA section 109 and MMS did not otherwise have authority to promulgate the regulation is similar to Tenneco's assertions which were rejected in Conoco, Inc. (On Reconsideration). Also, as in that decision, Phillips' argument that 43 CFR 218.40 is invalid because it arbitrarily defines a "report" to be each line on Form MMS-2014, must be rejected because the Board lacks authority to declare duly promulgated regulations of the Department to be invalid. Phillips' third contention concerning due process and fair dealing, however, raises matters which were not directly addressed by Conoco, Inc. (On Reconsideration).

[2] Because the Board may not declare a properly promulgated regulation invalid, the Board is not a proper forum for arguments that a regulation is constitutionally infirm, except to the extent that the constitutional infirmity gives rise to a challenge as to whether the regulation was properly promulgated. See Colorado-Ute Electric Association, Inc., 46 IBLA 35, 47 (1980). The Board, however, does have a duty to consider whether procedures followed by the Department satisfy due process requirements. See Clarence Lockwood, 95 IBLA 261, 266 (1987); Santa Fe Pacific Railroad Co., 90 IBLA 200, 220 (1986); Goodnews Bay Mining Co., 81 IBLA 1, 5-6 (1984).

Appellants' due process challenge has focussed on asserted confusion regarding development of the AFS and the information to be reported by operators regarding royalty obligations. In support of this contention, appellants cite the nonrespondent exceptions initially assessed by the RMP officials in this case which were later acknowledged to be the result of MMS error (SOR at 18). Further, appellants contend certain nonrespondent exceptions relating to discrepancies between information in the MMS database regarding active accounts and information reflected on Form MMS-2014 would have been avoided had MMS issued clear and timely instructions. Appellants also challenge as a violation of due process of law the MMS practice of sending a bill several months after the error is detected thus precluding the payor from making an earlier correction.

While these contentions are germane to certain aspects of the initial RMP assessments in these cases, the record indicates that the assessments have been dropped for all nonrespondent exceptions not based on a late report for transactions on which royalty is due. The Deputy Director upheld the assessments only as to those transactions on which royalty is due which were not timely reported to MMS.

The relevant regulation clearly provides that a completed Form MMS-2014 must be filed by the end of the month following the production month. 30 CFR 210.52. Further, the regulations authorize an assessment of an amount not to exceed \$10 per day for each report not received by MMS by the due date. 30 CFR 218.40(a). The field reports in the case file for IBLA 88-415 indicate that 510 MMS reports on Form MMS-2014 were received from 1 day to 6 months after the due date. This led to the assessment of \$5,100 which was upheld by the Deputy Director, MMS. Similarly, the field report in the case file for IBLA 88-416 indicates that 112 MMS reports were received from 1 day to 5 months after the due date. This formed the basis for the assessment of \$1,120 upheld by the Deputy Director of MMS. Appellant has not disputed the contention of MMS that the reports were not timely filed. Nor do we perceive any support for an assertion that appellant was confused as to the requirement that it timely file its royalty reports. In this context, we must conclude that the assessment is supported by the record and the regulations.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions of the Deputy Director, MMS, dated January 25, 1988, are affirmed.

C. Randall Grant, Jr.
Administrative Judge

I concur:

James L. Burski
Administrative Judge